IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32 (2) (b)

Description of case

Date of decision: 28.06.2006

Criminal Appeal No. 975 of 2001
(Old No. 63 of 1983)

1. Trilochan alias Tulsia (since deceased)
   S/o Narayan Dutt
2. Hari Dutt
   S/o Narayan Dutt
   Both R/o Village Khumar, Pattiwala
   Salt, District Almora.
3. Anil Kumar
   S/o Gulab Chand
   R/o Village Sahupuri
   P.S. Maidagin
   District Banaras …….Appellants

Versus

State ……..Respondents

Mr. B.P.S. Mer, Amicus Curiae for the appellants.
Mr. D.K. Sharma, Government Advocate for the State.

A.F.R. (Approved for Reporting)
Not approved for Reporting

Initials of Judges

Date: 28.06.2006

Note: Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

Judgment Reserved

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Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble Prafulla C. Pant, J.

Per: Hon'ble Prafulla C. Pant, J.

This appeal, preferred under Section 374 (2) of Code of Criminal Procedure, 1973 (herein-after for brevity referred as Cr.P.C.), is directed against the judgment and order dated 19.10.1982, passed in Sessions Trial No. 6 of 1982, whereby the then learned Sessions Judge, Almora has convicted appellants Trilochan alias Tulsia and Harri Dutt under Section 302

of Indian Penal code, 1860 (herein after referred as I.P.C.) and appellant Anil Kumar under Section 302 read with Section 34 I.P.C. and sentenced each of them to imprisonment for life.

2. We herd learned counsel for the parties and perused the entire record.

3. Prosecution story, in brief, is that Khimanand (deceased) and his brother P.W. 1 Chintamani had a shop of grocery and tea stall at Shashikhal Bazar within the limits of village Khumar, Tehsil Ranikhet, District Almora. Accussed/appellant Trilochan alias Tulsia had also a shop in said market in which he used to sell sweetmeat. According to the prosecution, during the period of Diwali in the year 1981, P.W. 1 Chintamani and his brother Khimanand (deceased) started selling sweets in their shop after purchasing the same from Ramnagar. This affected the business of accused Trilochan and on 25.10.1981, he objected to Chintamani and Khimanand and asked them not to cause economic loss to him. But they did not pay any heed to it. Accused/appellant Hari Dutt is brother of accused/appellant Trilochan. He (Hari Dutt) used to work in Deepak Restaurant in Delhi. The third accused/appellant Anil Kumar had also some business in Delhi. When P.W. 1 Chintamani and his brother did not pay any heed to the objection of Trilochan, he closed his shop on 28.10.1981 and came back on 30.10.1981 along with his brother Haridutt and a third

person (Anil Kumar). All the three traveled on said date from Ramnagar to Shashikhal in bus registration No. UPD 592 of the 'Kunaon Adarsha Motor Transport'. They reached Shashikhal on 30.10.1981 at about 3:30 P.M. All of them alighted from the bus and went towards shop of Khimanand and Chintamani which was by the side of the road. Out of the three appellants, Trilochan and Harri Dutt were armed with knives. When they reached at the stall of Khimanand, P.W. 4 Kunti Devi and P.W. 5 Jogdev, were having tea in the said shop. As soon as the three accused reached in the shop, accused Trilochan and the third person (Anil Kumar) got hold of Khimanand and dragged him out. Accused/appellants Trilochan and Hari Dutt thereafter started inflicting knife blows on the person of Khimanand. On this, P.W. 4 Kunti Devi asked Trilochan not to do so and she intervened. However, she received knife cut in her hand. Thereafter accused persons further dragged Khimanand from the shop to the road. Meanwhile, due to the shouts, P.W. 1 Chintamani (brother of Khimanand) who was taking rest in the inner room of the house, came out and also witnessed the incident. P.W. 1 Chintamani made attempts to save Khimanand but accused Trilochan and Hari Dutt wielded knives and made Chintamani run away from there. It is alleged by the prosecution that all the accused persons thereafter threw the dead body of Khimanand by the side of road and again forcibly boarded in the same bus registration No. UPD 592. They traveled through said but about half-a-kilometer

ahead and got down from it. P.W. 1 Chintamani thereafter lodged First Information Report (Ext. A-1) with nearest reporting police outpost, Maulikhal, where P.W. 3 Constable Balwant Singh prepared check report (Ext. A-4) of the first Information Report. He further made entry in the general dairy (a copy of which is extract Ext. A-5). P.W. 3 Constable Balwant Singh along with Constable Maheshanand came to the spot and kept the dead body of Khimanand on the roof of shop of his brother Chintamani. They guarded it till the arrival of P.W. 8 Sub-Inspector Moti Ram Sharma on 30.10.1981. On arrival of said Sub-Inspector, inquest report (Ext. A-9) of dead body was prepared in the presence of witnesses. Blood stained clothes (of the deceased) Ext. 1,2 and 3, were taken into possession by the police. Cash amounting to Rs. 305/- was also found in the pocket of the deceased, which was handed over to P.W. 1 Chintamani (informant). Recovered clothes were sealed and memo (Ext. A-2) was prepared. The police also prepared sketch of the dead body (Ext. A-10), police form No. 13 (Ext. A-11), chalan of dead body (Ext. A-12), sample seal (Ext. A-13) and letter to Chief Medical Officer for post mortem examination (Ext. A-14). The dead body was sent for post mortem examination to Ranikhet. P.W. 2 Dr. V.S. Pal conducted autopsy on 02.11.1981 in Ranikhet. P.W. 8 Moti Ram Sharma, the Investigating Officer also took the simple soil and blood stained soil from the place of incident and prepared memo (Ext. A-15) and site plan (Ext. A-16). Later on, the investigation was transferred

to P.W. 12 Raj Pal Singh, Station House Officer of Police Station Ranikhet. He arrested accused Anil Kumar. Meanwhile, accused Trilochan alias Tulsia surrendered before the court. As against accused Hari Dutt, the Investigating Officer got issued orders (Ext. A-28) of attachment of his movable property to compel him to surrender. After the arrest of Anil Kumar since he was not a known person to the witnesses, he was kept 'BAPARDA' (face covered) and was put to the identification. The test identification parade was conducted on 02.02.1982 before P.W. 7 Shri U.D. Chaube, the then Sub-Divisional Magistrate, Bara Mandal, Almora. After conclusion of the investigation, charge sheet (Ext. A-31) was submitted against the accused Trilochan alias Tulsia and Hari Dutt along with separate charge sheet (Ext. A-32), filed against accused Anil Kumar for their trial in connection with the offence punishable under Section 302 and 201 I.P.C.

4. The Munsif/Judicial Magistrate Ranikhet on receipt of the charge sheets, after providing the necessary copies to the accused persons, committed the case to the Court of Sessions, Almora. Learned Sessions Judge, after hearing the prosecution and defence framed charge under two heads against accused Trilochan alias Tulsia and Hari Dutt in respect of the offence punishable under Section 302 and 201 I.P.C. As against accused Anil Kumar charge of two heads was separately framed in respect of the offences punishable under Section 302 read with Section 34

I.P.C. and the one punishable under Section 201 I.P.C. All the three accused pleaded not guilty and claimed to be tried. On this, prosecution got examined P.W. 1 Chintamani informant and eye-witness, P.W. 2 Dr. V.S. Pal, who conducted autopsy on the dead body, P.W. 3 Constable Balwant Singh of the police outpost, Maulikhal, who received the First Information Report (Ext. A-1) and prepared the check report (Ext. A-4) and made endorsement in the general dairy (extract of which is Ext. A-5), P.W. 4 Kunti Devi, the star eye-witness, P.W. 5 Jogdev (another eye-witness), P.W. 6 Bhagwat Prasad, Conductor of the bus registration No. UPD 592, P.W. 7 U.D. Chaubey, the then Sub-Divisional Magistrate, before whom test identification parade was conducted for accused Anil Kumar, P.W. 8 Sub-Inspector Moti Ram Sharma, who initially investigated crime, P.W. 9 Constable Trilochan Singh and P.W. 10 Kamla Kant, both of whom have adduced the evidence that the accused Anil Kumar was kept 'BAPARDA' (face covered). Thereafter prosecution got examined P.W. 11 Head Constable Nanda Ballabh, who is also witness of the same fact that the accused Anil Kumar was kept 'BAPARDA' (face covered) before the test identification parade, and P.W. 12 Station Officer Raj Pal Singh, who concluded the investigation. The oral as well as documentary evidence was put to the accused persons under Section 313 of Cr.P.C. by the trial court in reply to which the accused persons alleged that the evidence adduced against them is wrong and they have been falsely

implicated. Accused Anil Kumar further alleged that his photographs were shown to the witnesses before test identification parade. After hearing the prosecution and the counsel of accused persons, learned trial court found accused persons Trilochan alias Tulsia and Harri Dutt guilty of the charge framed against them is respect of the offence punishable under Section 302 I.P.C. Accused Anil Kumar was found guilty of offence punishable under Section 302 read with Section 34 I.P.C., and after hearing them on sentence each one of them was sentenced to imprisonment for life. (However, all the three accused were acquitted of charge of offence punishable under Section 201 of I.P.C.). Aggrieved by their conviction and sentence, awarded against them, all the three preferred appeal from jail against said judgment and order dated 19.10.1982, before Allahabad High Court in the year 1983 from where this appeal has been transferred to this Court under Section 35 of U.P. Reorganisation Act, 2000, for its disposal. Meanwhile the appellants got released on bail from the Allahabad High Court.

5. Before further discussions, it is pertinent to mention here the ante mortem injuries found at the time of post mortem examination by P.W. 2 Dr. V.S. Pal, who prepared post mortem examination report (Ext. A-3) on 02.11.1981 at 10:00 A.M. Following ante mortem injuries were recorded by said Medical Officer on autopsy of the dead body of the deceased Khimanand:-

1. **Punctured wound (incised) 2.5 cm X .5cm chest wall deep, oblique down on medial just below injury of right scapula on right back.**
2. **Punctured wound (incised) 2.3cm X 4cm x chest wall deep on left chest 10 cm outer to left nipple at 3’0 clock position, vertical.**

On internal examination, the Medical Officer found 3 cm long wound on left chest wall corresponding to injury No. 2 and a wound on right chest wall corresponding to the injury. He found pleura cut corresponding to injuries both sides. It is also recorded in Ext. A-3 that there was blood in trachea. Also, lobe of right lung had an incised cut measuring 3cm X 2cm and the upper lobe had an incised cut 2cm long. Pericardium was also congested. Injured lobes were partially collapsed. Right and left pleural cavities contained 2 pint and 1 pint blood respectively. In the opinion of the Medical Officer, cause of death was shock and haemorrhage due to ante mortem injuries. According to P.W. 2 Dr. V.S. Pal, death had occurred 2-3 days before post mortem examination.

6. In all, there are four eye-witnesses of the incident. P.W. 1 Chintamani (an eye-witness), is brother of the deceased. He states that he along with his brother Khimanand used to run a grocery shop and tea stall at

Shashikhal for several years. Accused Trilochan alias Tulsia had also his shop of sweetmeat in Shashikhal Bazar. He used to harbour enmity with him and his brother Khimanand. Accused Harri Dutt is brother of accused Trilochan. This witness further states that on one earlier occasion, Trilochan quarreled with him and he (the witness) made a complaint under Section 107, 116 Cr.P.C. before Sub-Divisional Magistrate but said case resulted in compromise between the parties on 30.09.1981. However, three days before Diwali, in the year 1981, according to this witness, he purchased sweets from Ramnagar and started selling in Shashikhal. On this, on 25.11.1981, accused Trilochan objected and told that by selling sweets, loss in being caused to him (Trilochan). Again on 27.10.1981, accused Trilochan quarreled on this issue and thereafter on 28.11.1981, accused closed his shop and returned on 30.11.1981 at about 3:00 P.M. On that day, P.W. 1 Chintamani says that his brother Khimanand (deceased) was sitting in his shop. He further states that it was a weekly market day and witnesses P.W. 4 Kunti Devi and P.W. 5 Jogdev were taking tea in the shop. This witness further states that he was taking rest in the third room of the shop. Suddenly, he heard noise and came out. P.W. 1 Chintamani further narrates that he saw that accused Trilochan and his brother accused Hari Dutt, were giving blows of knives on the person of Khimanand (deceased) while third person had caught hold of the deceased. The witness further states that P.W. 4 Kunti Devi, who attempted to save Khimanand,

got knife cut in her hand. P.W. 5 Jogdev ran away after he saw knife blows being inflicted on Khimanand. Jogdev left his articles in the shop, which he had purchased from the market. P.W. 1 Chintamani further describes the incident that all the three accused then dragged Khimanand up to the motor road and left him by the side of the road. This witness further states that he got frightened on seeing the knives in the hands of accused persons. Lastly, P.W. 1 Chintamani says that after the incident, he lodged First Information Report (Ext. A-1) with the reporting outpost, Maulikhal.

7. Lodging of First Information Report by P.W. 1 Chintamani, on 30.10.1981 gets corroboration from statement of P.W. 3 Constable Balwant Singh, who was in charge Head Constable on 30.10.1981 at the reporting outpost and prepared the check report (Ext. A-4) on the basis of First Information Report (Ext. A-1). P.W. 3 Constable Balwant Singh further stated that after preparing the check report, he made necessary entry in the general dairy, extract of which is Ext. A-5. The ante mortem injuries found on the person of deceased Khimanand, which are quoted above, as recorded in post mortem examination report (Ext. A-3) by P.W. 2Dr. V.S. Pal, also corroborate the prosecution story narrated by P.W. 1 Chintamani to the extent that Khimanand died a homicidal death and injuries received by him were the injuries cause d by sharp edged weapons.

8. P.W. 4 Kunti Devi is the star eye-witness of this case. According to her on the date of the incident, it was 3:00 – 3:30 P.M. when she was heaving tea at Shashikhal in the shop of Khimanand and Chintamani. P.W. 5 Jogdev was also there. P.W. 4 Kunti Devi further states that when she was having tea in the shop, a bus came on the road from which accused Trilochan alias Tulsia and Hari Dutt (known to her) and one more person alighted and came to the shop of Khimanand. This witness further states that accused Trilochan and Hari Dutt were armed with knives. They caught hold of Khimanand and dragged him out of the shop. Third accused (Anil Kumar) caught hold of hands of Khimanand behind his back while rest of the two Trilochan alias Tulsia and Hari Dutt inflicted knife blows on the person of Khimanand. P.W. 4 Kunti Devi further states that she caught hold of coat of accused Tulsia and pleaded him with folded hands not to kill Khimanand. In this process she got knife cut in her hand. The witness further states that Jogdev on seeing that Khimanand is being given knife blows, fled from the scene. He left his purchased clothes also in the shop. Meanwhile, on hearing shouts, Khimanand's brother P.W. 1 Chintamani had already reached from the second floor of the house (in which the shop is situated). She further states that when Chintamani came down, they attempted to chase him also and thereafter ran away. Accused persons left the dead body on the side of the road. P.W. 5 Jogdev has also corroborated the statement of P.W. 1 Chintamani and

P.W. 4 Kunti Devi and he has stated that he along with Kunti Devi (P.W. 4) was having tea at the time of the incident. He has further stated that after accused Hariya and Tulsia, who were known to him alighted from the bus along with their third associate (Anil Kumar) and dragged Khimanand from his shop. And it is further corroborated by this witness that accused Hariya and Tulsia were armed with knives. According to witness, when he saw accused persons inflicting knife blows on Khimanand, he ran away from the scene, leaving his belongings at the shop. P.W. 5 Jogdev says that police returned his articles to him.

9. P.W. 6 Bhagwat Prakash is conductor of the bus registration No. UPD 592, who has stated that he was running in the route for 3-4 years before the date of the incident. He further states that on the date of the incident, the three accused persons got down at Shashikhal and went to the shop of Khimanand. P.W. 6 Bhagwat Prasad, the conductor, further corroborates that accused Tulsia and Hariya were armed with knives. This witness also corroborates the fact that the third accused caught hold of hands of Khimanand and remaining two accused armed with knives, inflicted injuries on the person of Khimanand. The witness further states that when Chintamani came out and wanted to apprehended the culprits, they wielded the knives at him on which he retreated. P.W. 6 Bhagwat Prasad, further states that after commission of crime, the accused persons leaving the dead body of

Khimanand, forcibly entered in the bus and traveled for about half a kilometer. And after threatening the staff and bus passengers, got down from the bus.

10. On going through the oral evidence of all the above four eye-witnesses, we find that the prosecution story narrated by the witnesses if not only natural but also trustworthy. The incident is of broad daylight. Neither P.W. 4 Kunti Devi nor P.W. 5 Jogdev nor P.W. 6 Bhagwat Prasad had any enmity with the accused persons.

11. As far as the accused Anil Kumar is concerned, he is not known to the witnesses. After his arrest, according to the witnesses, P.W. 9 Constable Trilochan Singh, P.W. 10 Head Constable Nanda Ballabh have stated that the accused person was kept 'BAPARDA' (face covered) and not shows to the witnesses before the test identification parade. P.W. 1 Chintamani, P.W. 4 Kunti Devi and P.W. 5 Jogdev, all the three eye-witnesses have stated on oath that they saw third accused (Anil Kumar) at the time of the incident and thereafter only at the time of test identification parade and at the time of their examination before the court. Statement of P.W. 7 Shri U.D. Chaube, the then Sub-Divisional magistrate, Bara Mandal, Almora, has stated that he conducted the test identification parade on 02.02.1982 in which accused Anil Kumar was mixed up with the similar other persons. The specific marks, which could have affected the test identification, were

kept covered by stickers. According to this witness, at the time of test identification parade, the test identification report (Ext. A-8) was prepared. The said report discloses that witnesses Chintamani, Jogdev and Kunti Devi correctly identified Anil Kumar in the test identification parade. These witnesses have identified accused Anil Kumar in the court also. As such, the participation of this accused in the crime, is also fully proved on record. Though Anil Kumar was not armed with any knife but his active role in commission of crime with accused Trilochan alias Tulsia and accused Hari Dutt alias Hariya, right from the point he alighted from the bus and till the commission of crime with the accused persons, fully establishes the fact that he had common intention to commit murder of Khimanand with the other co-accused that is why he caught hold of hands of Khimanand so that accused Trilochan and Hari Dutt may inflict knife injuries on the person of Khimanand with intention to kill him.

12. From the appreciation of evidence as discussed above, we are in agreement with the learned Sessions Judge that the prosecution has been successful in proving the charge of offence punishable under Section 302 I.P.C. framed against the accused Trilochan, Hari Dutt and that of one under Section 302/34 I.P.C. against Anil Kumar. As such, we are of the view that they have been rightly convicted of the charge framed by the trial court against them and sentenced them imprisonment for life.

13. On behalf of the appellants, it is argued that the First Information Report is a delayed one and the accused persons have been falsely named in it due to the enmity. The perusal of the check report (Ext. A-4) of the First Information Report (Ext. A-1), shows that the incident had taken place at 3:30 P.M. and on the same day the First Information Report has been lodged at 5:00 P.M. It is pertinent to mention here that the distance between Shashikhal, where the incident took place and the outpost where the First Information Report was given, is 3 ½ Kms. away. Lodging report within 1 ½ hours, cannot be said to be a delayed information. It is also argued that First Information Report is ante time. We do not see any force in the arguments advanced on behalf of the appellants for the reason that Shashikhal where the incident had taken place is at a distance of 110 Kms. (in hill area) from police station Ranikhet and P.W. 8 Moti Ram Sharma, who initially started investigation, has stated that by the time he along with the other police men reached at the spot it was already night and the dead body was kept on the roof of the house of Chintamani and two police men (Head Constable Balwant Singh and Constable Maheshanand) were posted to guard the same. The inquest report (Ext. A-9) was prepared on the next day along with photo sketch (Ext. A-10) and other necessary papers police form No. 13 and letter to Chief Medical Officer etc (Ext. A-11 to Ext. A-13).

14. Shri B.P.S. Mer, Amicus Curiae on behalf of the appellants, argues that all witnesses are chance witnesses and they cannot be relied. On going through the evidence on record, we are of the view that since the incident had not taken place inside the house or at a lonely place, as such neither the presence of P.W. 4 Kunti Devi is un natural not the presence of P.W. 5 Jogdev nor that of P.W. 6 Bhagwat Prasad, the conductor of the bus in which the accused persons traveled, is an un natural one. In such a day light incident, which has occurred in a small market place, such witnesses are the natural witnesses of the incident and they cannot be disbelieved on the ground that they happen to be at the spot on the day of the incident.

15. It is also contended on behalf of the appellants that appellant Hari Dutt and appellant Anil Kumar had their business in Delhi as such, they had no enmity with Khimanand (deceased). In this connection, it is further contended that there is no motive on their part in commission of crime. Needless to say that where there are eye-witnesses of commission of crime, motive loses its importance. Apart from this, as far as Hari Dutt is concerned, he is real brother of accused Trilochan and had enmity with Khimanand, as Khimanand started selling sweets in his grocery shop cum tea shall, which affected business of Trilochan of selling sweets. Regarding Anil Kumar, it has come on the record that he is friend of accused Hari Dutt, who accompanied

him from Delhi and after commission of crime went with him. In the circumstances, Anil Kumar need not to have separate motive of his own against Khimanand. The fact that he had come to assist his friend Hari Dutt in commission of crime is a sufficient motive on his part.

16. It is also submitted on behalf of the appellants that P.W. 4 Kunti Devi, who is said to have got injured in the incident, was not got medically examined by the prosecution, as such, it cannot be said that she was present at the time of the incident. P.W. 4 Kunti Devi in her cross-examination has stated that on the day of the incident, she had come to Shashikhal from her village to purchase salt and gur etc, as it was a day of weekly market. She has further stated in the cross-examination that after the incident, she had gone back to her village and after a couple of days when the police wanted that she be medically examined, doctor in the hospital said that since the injury has now got old, there is no need to prepare the injury report. In the circumstances, merely not getting medically examined does not create any reasonable doubt as to the truthfulness of the prosecution story, which is otherwise natural, reliable and trustworthy.

17. Before parting with the judgment, we think it necessary to record our appreciation that Shri B.P.S. Mer, Amicus Curiae appointed to represent the appellants, has done heard labour to assist the Court. It

is pertinent to mention here that during the period of appeal, appellant No. 1 Trilochan alias Tulsia is reported to have died, as such appeal filed on his behalf stands abated.

20. For the reasons discussed in this judgment, the appeal of the appellants Hari Dutt and that of Anil Kumar is liable to be dismissed. The same is dismissed. Both of them are on bail. Their bail is cancelled. Their conviction and sentence i.e. imprisonment for life, as awarded by the trial court, is maintained. They shall be taken into custody by the court concerned to make them to serve out the sentence of imprisonment for life.

(Prafulla C. Pant, J.) **(Rajeev Gupta, C.J.)**

Dt: 28.06.2006
Sweta